Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:UNY:GL-501411-00
ADMelzer

date:

to: David S. Smith and Kenneth Scholz

from: District Counsel, Upstate New York District, Buffalo

subject: **Advisory Opinion on Estate Tax Lien and Due Process**

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FACTS AND ISSUES

In the instant case, all estate funds were distributed to the executor and other heirs. No assets remain in the estate itself. To date, none of these people have come forward to pay the remaining estate tax liability. The executor is aware of the tax liability and has asked for something in writing prior to making a decision as to whether he will voluntarily pay over funds from his personal account (funds received from the estate).

In the past, the Service would sent a letter to the executor advising him of the following:

1) liability due from the estate;

2) lien on all assets of the estate pursuant to I.R.C. § 6324;
3) demand for payment to the extent of the value of assets received from the estate;
4) 30-day deadline for payment; and
5) warning of possible levy action, pursuant to I.R.C. § 6331, in the event of non-payment.

A pattern letter has been used for some time now. If the executor/beneficiary/transferee did not reply to the pattern letter, the Service would proceed with levy action against that person based on the estate tax lien. A general question was raised regarding the effect that the Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 98") has on the payment of estate tax liens by beneficiaries, fiduciaries, transferees, etc.

ISSUES

(1) Does the Service still have the ability to levy on these parties who are in possession of estate assets without going through transferee assessment procedures?

(2) If so, are these individuals entitled to the same due process rights as other taxpayers against whom we have assessments?

(3) What procedures are the Service required to follow in order to pursue assets held by these parties? Is a warning letter needed? A Form 1058 letter (Final Notice of Intent to Levy)? A Notice of Levy?

(4) Is the pattern letter currently being used sufficient to protect the parties' rights under RRA 98?

ANALYSIS

Collection of federal estate and gift taxes is distinct from collection of federal income taxes. Special additional lien provisions supplement the general tax lien by giving the Service the right to follow the special estate property into the hands of estate beneficiaries. When estate taxes are unpaid (whether arising out of a filed return with an unpaid tax or a subsequently determined deficiency), a tax lien attaches to property of the gross estate, which arises as of the date of death. See I.R.C. § 6324; Treas. Reg. § 301.6324-1(a)(1).

The estate tax lien lasts for a period of ten years from the date of death, unless the estate tax is paid or becomes unenforceable because of a lapse of the expiration of the statute of limitations on collection. I.R.C. § 6324(a). There is no requirement for assessment, notice, or demand of the tax liability for the estate tax lien to come into existence. This lien arises in addition to and cumulative of the general tax lien of I.R.C. § 6321. The Service may collect a delinquent estate tax through enforcement of either the general tax lien or the estate tax lien. The estate tax lien is usually preferable because it arises as of the date of death after the estate tax is not paid, and no assessment, notice, or demand is required. See Detroit Bank v. United States, 317 U.S. 329, 63 S.Ct. 297 (1943). However, the lien arises only on property included and taxed as part of the gross estate of decedent.

The Service's authority to seize property by levy arises when a federal tax lien, such as the estate tax lien under I.R.C. § 6324, attaches to the property. Section 6324 does not authorize the making of a levy; rather it defines the property of the taxpayer which may be levied upon. Section 3401 of the RRA 98 adds a new I.R.C. § 6330 to provide that no levy may be made on any property or right to property of any taxpayer unless the Service notifies that taxpayer in writing before that levy is made. This provision codifies pre-existing administrative rights available to taxpayers. Specifically, I.R.C. § 6330 states:

> (a) REQUIREMENT OF NOTICE BEFORE LEVY.-
>
> (1) IN GENERAL.-No levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made. Such notice shall be required only once for the taxable period to which the unpaid tax specified in paragraph (3)(A) relates.

Hence, at least 30 days prior to levying on any person's property or rights to property, the Service must notify that person in writing of their right to a hearing. The notice must be given in person, left at the taxpayer's home or place of business, or sent by certified or registered mail to the person's last known address. Only one notice is required for each tax period to which the underlying tax liability relates. See I.R.C. § 6330(a).

Section 6330(c)(2)(B) also authorizes the person to challenge the existence or the amount of the underlying tax liability for any tax period that the taxpayer did not receive a statutory notice of deficiency for tax or did not otherwise have an opportunity to dispute such tax liability. A person who has exercised his or her rights to appeal under I.R.C. § 6330 now has specific authority to seek judicial review of an adverse IRS decision. The Tax Court has specific jurisdiction to hear matters concerning taxes under its jurisdiction. Generally those taxes would include income taxes, gift taxes, excise taxes, and now § 6672 Trust Fund Recovery

Penalties. Other taxes, including employment tax liabilities, are subject to judicial review by a U.S. District Court.

The relevant question is whether I.R.C. § 6330 applies to the special estate tax lien under § 6324. The answer depends on the property in issue. When the property is cash or other property which cannot be directly traced as being subject to the estate tax lien, the transferee must be assessed under I.R.C. § 6901. Once the transferee assessment is done, the CDP procedures are applicable to a subsequent lien or levy.

On the other hand, when the property is specifically identifiable, tangible property, the estate tax lien is traceable. The estate tax lien is already attached to the property by the time the estate asset is transferred to the beneficiary. Hence, such beneficiary takes the estate asset subject to the Service's lien for the estate's taxes.

A beneficiary taking an estate asset subject to the tax lien is not the person described in I.R.C. § 6331(a). Therefore, like a nominee, the beneficiary is not entitled to a collection due process hearing or an equivalent hearing. That person may, however, seek reconsideration by the Service office collecting the tax, assistance from the National Taxpayer Advocate, or an administrative hearing before the Appeals Office under its Collection Appeals Program. Note that any such administrative hearing would not be a collection due process hearing under I.R.C. § 6330 and any determination or decision resulting from the hearing would not be subject to judicial review. See Treas. Reg. § 301.6330-1T(b)(2)Q&A-B5.

Internal Revenue Code § 6330 does not replace existing statutory requirements that are imposed on the Service before it may levy (seize) a taxpayer's property. Thus, the Service will continue to issue a written Notice and Demand for payment of the tax within 10 days as the first step in the levy process. The pattern letter currently in use is sufficient to give the beneficiary Notice and Demand and to preserve the beneficiary's rights under RRA 98.

CONCLUSION

The Internal Revenue Service's right to collect the estate tax lien against beneficiaries of a taxpayer's estate has not changed with the passage of RRA 98. A levy may continue to be made without the necessity of a transferee assessment under I.R.C. § 6901 (with the exception of cash and other property not able to be traced) since the remedies provided by that section are not exclusive but are cumulative and alternative to other methods of tax collection. In an estate tax situation, it is not the lien that is levied upon but the only the specific property that is encumbered by the lien.

Moreover, since the estate tax lien has already attached to the assets by the time they are transferred to the beneficiaries, the beneficiaries are not "persons" as described in I.R.C. § 6331. Hence, the beneficiaries are not entitled to the collection due process hearing provided for in I.R.C. § 6330. We believe that the Service may continue to issue its pattern letter (i.e. Notice and Demand) to the beneficiaries.

Having rendered our opinion, we are closing our file. Any questions can be directed to Anne D. Melzer at (716) 551-5614, ext. 30. Thank you for your cooperation in this matter.

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